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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 JONATHAN OTTO,

4 Plaintiff,

5 v.

17 CV 4712 (GHW)

6 HEARST COMMUNICATIONS, INC.,

7 Defendant.

Decision

8 -----x

New York, N.Y.

July 19, 2019

10:33 a.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge

13 APPEARANCES via Speakerphone

14 LIEBOWITZ LAW FIRM, PLLC
15 Attorneys for Plaintiff

16 BY: JAMES H. FREEMAN

17 NATHANIEL S. BOYER
18 RAVI V. SITWALA
Attorneys for Defendant

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(In chambers)

THE COURT: This is Judge Woods. Do I have counsel for plaintiff on the line?

MR. FREEMAN: Yes, your Honor.

THE COURT: Good. Thank you. Can you please identify yourself for the record.

MR. FREEMAN: Yes. Good morning, Judge. James Freeman on behalf of plaintiff.

THE COURT: Good. Thank you. Do I have counsel for defendant on the line?

MR. BOYER: Yes, you do, your Honor.

THE COURT: Good.

MR. BOYER: This is Nathan Boyer of the Hearst Corporation for defendant Hearst Communication, Inc., joined by my colleague Ravi Sitwala, also of the Hearst Corporation.

THE COURT: Good. Thank you very much.

So, counsel, first let me thank you for joining this conference.

I am going to be issuing my decision in this case today. I'm going to do so orally, as permitted by Rule 52. I'm going to ask you to place your phones on mute and to indulge me as I read through my decision here. I'll let you know when you should take your phones off of mute to the extent it's not apparent to you.

So let's begin.

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I. OVERVIEW.

Plaintiff Jonathan Otto ("Plaintiff" or "Otto") filed this action against Defendant Hearst Communications Inc. ("Defendant" or "Hearst"), alleging that Hearst's use of a photograph taken by Otto in connection with a story which was published on Esquire.com infringed Otto's copyright in the photograph. On December 10, 2018, I granted Otto's motion for summary judgment on the issues of Hearst's liability for copyright infringement and Hearst's affirmative defenses, including its fair use defense. Dkt. No. 85. On July 15, 2019, I held a bench trial on the issues of whether Defendant's infringement of Plaintiff's copyright was willful under 17 U.S.C § 504(c)(2) and the appropriate award of statutory damages for Defendant's infringement. Based on the evidence and testimony presented at trial, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. Hearst's Use of Otto's Photograph

Plaintiff Jonathan Otto is a Vice President of Operations at Deutsche Bank. Otto is not, and has never been, a professional photographer and has never been in the business of licensing photographs. Hearst is a for-profit entity with a significant presence in the publishing business. Hearst operates a diversified media business and employs more than 1,000 people. Hearst Magazines Digital Media ("HMDM") is a

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1 branch of Hearst which is composed of 26 magazine websites,
2 including Esquire.com.

3 On June 10, 2017, Otto attended his friend's Kristen
4 Piatowski's wedding at the Trump National Golf Club in
5 Bedminster Township, New Jersey. President Donald Trump made a
6 surprise appearance during the wedding reception. When
7 President Trump entered the reception, Otto "just started
8 taking photos" with his iPhone. Otto captured between
9 twenty-four and one hundred snapshots of President Trump at the
10 reception, some of which were created using the iPhone's
11 "burst" function. One of the images that was part of an iPhone
12 "burst" was the photograph which is at issue in this
13 litigation, which depicts the President holding hands with the
14 bride. The photograph was not staged. A camera and two cell
15 phones are visible in the frame of the photograph. One of the
16 cell phones features prominently in the lower right side of the
17 photograph, its screen capturing the image of the President and
18 the bride. The parties stipulated that other people at the
19 wedding took photographs of the President.

20 After taking the photograph, Otto texted a copy of it
21 to another wedding guest named Sean Burke, who had asked Otto
22 to share the photograph with him. Otto did not post the
23 photograph to social media and he did not provide the
24 photograph to any commercial news organizations at that time.
25 However, Laura Piatowski, a family member of the bride, posted

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1 the photograph to her Instagram account, @lauramp11.

2 Michael Sebastian, the Digital Director of
3 Esquire.com, testified at trial. The Court found his testimony
4 to be fully credible. Mr. Sebastian joined Hearst in July 2015
5 and has served as Digital Director of Esquire.com since May
6 2017. As part of his testimony, Mr. Sebastian provided a
7 summary of his experience working with Peter Wade, who held the
8 position of weekend editor of Esquire.com from February 2016 to
9 June 2017. Mr. Wade left Esquire.com shortly after the events
10 at issue in this litigation, but his departure was planned
11 prior to June 11, 2017. Mr. Sebastian testified that Mr. Wade
12 left the company on good terms. Mr. Sebastian also testified
13 that Mr. Wade had substantial previous experience working as a
14 writer and editor with various news and commentary websites and
15 that he was not aware of any instance in which Mr. Wade had
16 been accused of copyright infringement. At the time of the
17 events at issue in this case, Mr. Wade had been reporting to
18 Mr. Sebastian for approximately one month. However, Mr.
19 Sebastian was acquainted with Mr. Wade prior to that period
20 through Mr. Sebastian's role as News Director. As an aside,
21 counsel for Plaintiff emphasized during closing arguments the
22 limited amount of time for which Mr. Wade worked for Mr.
23 Sebastian. However, I note that Mr. Wade had been in his role
24 as Weekend Editor for approximately 16 months prior to the
25 events underlying this action, and that there is no evidence of

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1 any concerns regarding his compliance with the copyright laws
2 prior to the events at issue here.

3 On Sunday, June 11, 2017 at 10:00 a.m., Mr. Wade wrote
4 to Mr. Sebastian and pitched him a news story about President
5 Trump crashing weddings at his New Jersey golf course. In his
6 message, Mr. Wade attached a photograph of President Trump from
7 the night of the wedding. That image was not Otto's
8 photograph. Instead, it was an image of the President posing
9 between the bride and groom. At 10:01 a.m., Sebastian asked
10 Wade: "Is that a recent picture?" At 10:02 a.m., Wade
11 responded: "yeah, it's from last night according to The Hill.
12 Trying to find original source. Oh wow. There are a bunch of
13 them," linking to Laura Piatowski's Instagram account. At
14 10:06 a.m., Sebastian responded to Wade: "Let's start there."
15 Wade posted a "thumbs up" emoji in response. These messages
16 were the only communications between Mr. Wade and Mr. Sebastian
17 on June 11, 2017 concerning the Trump wedding crashing article.
18 When Mr. Sebastian sent his "Let's start there" message, he did
19 so in part because he believed that the fact that photos of
20 President Trump crashing a wedding had surfaced on Instagram --
21 and that Trump clubs have advertised the President's
22 willingness to appear in such photos -- was notable. Mr.
23 Sebastian believed that this article fit within the broader
24 commentary in the news media (including several prior articles
25 on Esquire.com) about the President's apparent desire for

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1 public adoration and publicity. The Court does not have a
2 basis to conclude that Mr. Sebastian told Mr. Wade to "start
3 there" because Mr. Sebastian believed that Mr. Wade should take
4 the images from the Instagram account without considering
5 whether a license for the images was necessary.

6 At 10:41 a.m., Mr. Wade posted the completed
7 Esquire.com article entitled "President Trump is the Ultimate
8 Wedding Crasher," which displayed Otto's photograph. Forty-one
9 minutes passed between the time Mr. Wade pitched the story to
10 Mr. Sebastian and the time that Otto's photograph was published
11 to the Esquire.com website. Otto's photograph was the second
12 of three images in the article. The first photograph in the
13 article immediately following the headline was the staged
14 photograph of the President with the bride and groom that Mr.
15 Wade had sent to Mr. Sebastian. Footers below all three
16 photographs attributed them to Laura Piatowski's Instagram
17 account. The article did not credit Otto as the photographer
18 or otherwise attribute the photograph to Otto.

19 Hearst did not seek Otto's permission to publish the
20 photograph and Otto never directly granted Hearst authorization
21 to copy the photograph or distribute copies of the image to the
22 public. In fact, Hearst was not aware of Otto's claim of
23 ownership in the photograph before receiving the complaint in
24 this action. Mr. Sebastian testified that he never saw Otto's
25 photograph or the text of the article before they were

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1 published, that he did not make any attempt to investigate the
2 identity of the copyright owner of the photograph and that he
3 did not conduct an analysis of whether inclusion of the
4 photograph in the article would be fair use. Instead, he left
5 that determination in the hands of Mr. Wade. Mr. Wade was not
6 called as a witness at trial, nor was he deposed. As a result,
7 the Court is left with little evidence of Mr. Wade's mental
8 process when he decided to use Otto's photograph to illustrate
9 his article. As I will describe in more detail later, without
10 any clear evidence to shed light on Mr. Wade's state of mind,
11 the Court does not conclude that Mr. Wade willfully infringed
12 Otto's copyright.

13 At the time of the publication of the article at issue
14 in this case, Hearst used a content management system (or
15 "CMS") to store information about published and unpublished
16 content from many of Hearst's websites, including Esquire.com.
17 Among the information collected by CMS is information about
18 photographs used in articles. Indeed, in order for a
19 photograph to be published on one of Hearst's public-facing
20 websites, certain CMS fields must be completed with respect to
21 the image, specifically either the "Copyright" section or the
22 "Photographer Name" section. Those fields are used to generate
23 an attribution line for the photograph.

24 Hearst editors can edit some, but not all of the
25 information about a photograph stored in CMS. In the

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1 "Copyright" field Hearst editors are only able to select from a
2 limited, pre-populated list of entries which represent common
3 sources for licensed photographs. If the source of a
4 photograph is not included in the pre-populated list, the
5 editor must manually type an attribution line into the
6 "Photographer Name" field. Mr. Sebastian testified that Hearst
7 editors will generally write the name of their source or
8 licensor in this field, even if that person is not the actual
9 photographer. CMS also contains fields for "Limited Rights,"
10 "Syndication Rights" and "Image Rights." Those fields are used
11 to tag images for possible re-use in a variety of contexts.
12 They must be populated using an established menu of options.
13 There is no option in CMS for an editor to select "Fair Use" as
14 the basis for a determination that a given image may properly
15 be published.

16 The Court was provided with exhibits showing
17 screenshots of CMS as it was completed with respect to Wade's
18 article. They show that the "Copyright" field for Otto's
19 photograph was left blank and the "Photographer Name" field
20 lists "Instagram/@lauramp11." A slide box has been toggled to
21 indicate "No" next to a query regarding "Limited Rights." The
22 "Syndication Rights" field indicates "OK for syndication." The
23 "Image Rights" field states "No Rights." The "Image Rights"
24 field specifically refers to whether the image can be re-used
25 in a new article. The "No Rights" selection within this field

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1 in the CMS system with respect to Otto's photograph indicates
2 that the photograph was not to be re-used in another Hearst
3 article. The Court infers from this entry that Mr. Wade made a
4 determination that his basis for using the image in connection
5 with the article would not necessarily permit its use in other
6 Hearst works. This is consistent with a possible determination
7 by Mr. Wade that his publication of the photograph was fair
8 use.

9 At the time Hearst published Otto's photograph, Hearst
10 had the ability to view or use other photographs of President
11 Trump's attendance at the wedding. Several third-party news
12 outlets published the photograph after apparently obtaining it
13 from Instagram. Many similar images of President Trump at the
14 wedding also circulated on the internet. Several third-party
15 news organizations published Otto's photograph. Other
16 photographs of the President's attendance at the wedding have
17 been published. Numerous news websites ran articles about
18 President Trump's appearance at the wedding and included
19 photographs and video other than, or in addition to, Otto's
20 photograph.

21 B. Hearst's Copyright Training Program and Policies
22 and History of Copyright Litigation

23 Brooke Siegel, the Vice President of HMDM (and Mr.
24 Sebastian's boss), testified at length regarding HMDM's
25 approach to the licensing and protection of third-party

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1 content. She testified credibly that HMDM publishes a
2 substantial volume of content, and, particularly, that it
3 publishes a high volume of images. In particular, the 26
4 U.S.-based websites that she oversees publish, on average,
5 8,859 unique pieces of content and use 79,893 images each
6 month. Almost every article published by HMDM contains some
7 photographs, graphics, videos, or GIFs, averaging nine images
8 in each piece of HMDM content. This is merely a fraction of
9 the aggregate volume of content published by Hearst across all
10 of its media platforms. Through its various domestic and
11 international platforms, Hearst publishes an immense volume of
12 content that frequently includes images.

13 Ms. Siegel's unchallenged testimony, which the Court
14 accepts, described HMDM's respect for the intellectual property
15 rights of content creators. She testified that, because it
16 respects intellectual property rights, Hearst pays a
17 substantial amount each year both for enterprise licenses with
18 Getty Images and the Associated Press for editorial use of
19 photographic content, and directly to photographers and content
20 creators to license content. Her uncontested, and credited,
21 testimony, was that HMDM's practice is to only use content that
22 it believes it has the right to use because (i) it owns the
23 copyrights, or (ii) it has obtained a license or other
24 permission from the copyright owner or authorized licensing
25 agent, or (iii) the use would be a "fair use." She testified

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1 that HMDM is generally conservative when it comes to "fair use"
2 decisions. HMDM empowers its editorial teams to make fair use
3 decisions in appropriate circumstances consistent with the
4 training they receive. Like Ms. Siegel, Mr. Sebastian
5 testified that editorial teams are empowered to make their own
6 decisions regarding the use of third-party content, including
7 making fair use decisions. Mr. Sebastian testified that, in
8 situations in which his team would like to use media on
9 Esquire.com that is not available on Getty or the Associated
10 Press, they will investigate who owns the copyright for that
11 material and will then try to communicate with the copyright
12 owner to get permission to use the photograph. Mr. Sebastian
13 also testified that his team is empowered to make
14 determinations regarding whether the use of a potentially
15 copyrighted work would be fair use.

16 In order to protect against the improper misuse of
17 others' copyrighted materials, HMDM does a number of things.
18 First, as Ms. Siegel testified, the company strives to hire and
19 promote employees and freelancers who are knowledgeable and
20 experienced with issues concerning rights clearance and
21 copyright law. Second, to provide employees and freelancers
22 with information regarding copyright issues, Hearst conducts
23 in-house training programs, which I will describe in more
24 detail momentarily.

25 At the time of the publication of Wade's article, as

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1 now, Hearst employed in-house lawyers in the Office of General
2 Counsel who are knowledgeable about U.S. copyright law and
3 about licensing practices in the publishing industry. Lawyers
4 from Hearst's Office of General Counsel make themselves
5 available regularly to answer questions by Hearst employees
6 about copyright issues. Ms. Saketkoo, an attorney in the
7 Hearst Corporation Office of General Counsel, testified that
8 the position of her office is that it does not instruct Hearst
9 personnel to take certain actions, but rather, serves as a
10 resource for consultation and provides editors and writers with
11 the tools to make their own decisions.

12 HMDM engages Hearst's Office of General Counsel to
13 provide editors with copyright training sessions. These
14 sessions are provided by Hearst lawyers to HMDM's editorial
15 teams. During these sessions, the lawyers address subjects of
16 copyright authorship and ownership, the licensing of
17 copyrighted content, and fair use. They also answer the
18 attendees' questions. The training sessions last from 90
19 minutes to two hours. Ms. Siegel testified that she found the
20 information provided in those sessions to be informative,
21 interesting, and useful for editors confronting such questions.
22 Attendees at the training sessions are instructed to contact
23 the legal department if they have questions. Mr. Sebastian
24 testified that the presentation materials are emailed to
25 participants after the presentations are given. However, Ms.

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1 Saketkoo testified that training materials are not distributed
2 after presentations. Given her experience in conducting the
3 copyright trainings, the Court credits Ms. Saketkoo's testimony
4 on this point. None of the witnesses employed by Hearst were
5 aware of any written policies regarding fair use, other than
6 the slides used during the training seminars, which were not
7 presented to the Court. However, as Ms. Saketkoo testified at
8 trial, the Office of General Counsel provides contact
9 information for lawyers in the office following the training
10 sessions.

11 As a result of HMDM's hiring practices, legal
12 training, and the availability of expert lawyers and senior
13 editors for consultation, Ms. Siegel believed that the system
14 in place at HMDM was adequate to provide her teams with the
15 tools necessary to make good decisions regarding the use of
16 third-party content, which, I understand to mean she believed
17 it adequate to protect the legal rights of third-party content
18 providers.

19 Hearst has been sued for copyright infringement in the
20 past. Ms. Saketkoo was able to identify four cases filed in
21 this district between 2016 and 2017 that involved claims of
22 copyright infringement against Hearst. Plaintiff introduced
23 Plaintiff's Exhibit 20, which is a docket sheet from this
24 district. That exhibit shows nine cases which may involve
25 copyright infringement which were filed in this district

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1 against Hearst between 2016 and November 9, 2017. However, the
2 Court has no information regarding the nature of the specific
3 allegations in those cases or their merit. With respect to
4 HMDM, other than this case, Ms. Siegel recalled only three
5 other instances of HMDM being sued for copyright infringement
6 since she joined the company in 2015. She views that as a very
7 positive track record given that HMDM publishes approximately
8 80,000 images a month.

9 C. The Reasonable License Fee for Otto's Photograph

10 The only revenue lost by Otto and the only expense
11 saved by Hearst as a result of Hearst's use of Otto's
12 photograph without a license is the amount of the reasonable
13 license fee that Hearst did not pay to Otto. At trial, Hearst
14 offered the testimony of two expert witnesses who opined
15 regarding the amount of that reasonable license fee. John G.
16 Plumpe is the managing director of Epsilon Economics and has
17 extensive experience in the valuation of intellectual property.
18 Eric Rachlis is a photography and licensing consultant who has
19 worked in the film and image licensing industry for almost 30
20 years. I find that both experts were qualified to give
21 testimony regarding the value of a reasonable license fee for
22 Otto's photograph.

23 As a preliminary matter, there was some contradicting
24 testimony offered at trial regarding the terms "stock,"
25 "editorial," and "commissioned" photography. Mr. Plumpe

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1 identified only two categories of photographs: "commissioned"
2 photographs, which are custom shots for the purchaser at the
3 purchaser's request, and "stock" photographs, which includes
4 all ready-to-use photographs available to be licensed. I
5 understand that Mr. Plumpe was using the definitions of those
6 terms as they were used in internal documents he received from
7 Hearst, which varied somewhat from the use of those terms in
8 the market, as described by Hearst's other expert, Mr. Rachlis.
9 Mr. Rachlis distinguished between "stock" photographs and
10 "editorial" photographs. According to Mr. Rachlis, a stock
11 photograph is a "generic image . . . used as a graphic or to
12 illustrate a concept." Mr. Rachlis testified that Otto's
13 picture was not a stock photograph under his definition and
14 that his estimate of a reasonable licensing fee for Otto's
15 photograph was based on editorial photos available for license
16 on Getty Images. I credit Mr. Rachlis' testimony on both of
17 those points. However, I also find that under the definition
18 of stock photograph provided by Mr. Plumpe, Otto's photograph
19 was a stock photograph because it was not commissioned. Based
20 on this analysis, I reject Plaintiff's contention that neither
21 expert's report was reliable because both experts improperly
22 categorized Otto's photograph as a stock photograph. It is
23 clear that, while Mr. Plumpe adopted Hearst's language in
24 describing Otto's photograph as a stock photograph, he knew
25 that the relevant comparators were "editorial" images. This is

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1 demonstrated by his selection of relevant images as comparators
2 to evaluate the appropriate license fee, as I will describe in
3 just a moment.

4 At trial, Mr. Plumpe testified regarding the licensing
5 fees that Hearst paid for the use of other single photographs
6 on Esquire.com from 2015 to 2017. Mr. Plumpe reached his
7 conclusions after examining a spreadsheet maintained by Hearst
8 employees which tracked the images for which Hearst has paid an
9 individual fee to acquire the rights to use the photographs on
10 Esquire.com. Mr. Plumpe identified a subset of thirteen
11 photographs licensed by Hearst from 2015 to 2017 that he
12 believed had elements in common with Otto's photograph,
13 specifically because they are non-staged images of President
14 Trump or other public figures, often among the general public.
15 Based on his evaluation of the license fees paid for those
16 photographs, Mr. Plumpe estimated that a reasonable license fee
17 for Otto's photograph would be \$100. Mr. Plumpe also testified
18 that based on his consideration of licenses available through
19 websites such as Getty Images, standard license fees for
20 photographs of Donald Trump, paparazzi photographs, and
21 celebrity sightings range from \$175 to \$575, depending on image
22 size. However, Mr. Plumpe made clear that his \$175 to \$575
23 figure was based on his evaluation of licenses made available
24 for purchase by the general public, not the prices available to
25 major media companies like Hearst.

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1 Mr. Rachlis also calculated a range of potential
2 reasonable license fees for Otto's photograph based on the
3 public-facing Getty Images website. Mr. Rachlis analyzed
4 photographs of recent images of President Trump and recent
5 paparazzi-type images of celebrities that were available for
6 digital use in an editorial-style article on a corporate
7 website or blog in the arts or entertainment industry. Mr.
8 Rachlis noted that the cost of these licenses ranged from \$108
9 to \$126 for a three-month license and \$162 to \$178 for a
10 three-year license with up to five years of archival rights.
11 Mr. Rachlis also stated that certain factors affect the value
12 of a license, specifically: (1) whether the use of the
13 photograph is commercial or editorial in nature (with
14 commercial uses garnering higher license fees); (2) whether the
15 license to use the photograph is exclusive or non-exclusive
16 (with exclusive licenses garnering higher fees); (3) the
17 uniqueness and quality of the photograph (with unique or high
18 quality photographs garnering higher license fees); (4) the
19 medium of the use, including whether it is in print or online
20 (with print uses garnering higher license fees); and (5) the
21 duration of the use (with longer durations garnering higher
22 license fees). Based on the range of license fees he observed
23 on the Getty website and his evaluation of these five factors,
24 Mr. Rachlis concluded that a reasonable license fee for Otto's
25 photograph would be \$125, assuming that Hearst did not use its

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1 bargaining power as a large media company to negotiate a lower
2 rate. However, Mr. Rachlis testified that large media
3 companies like Hearst are typically able to negotiate rates
4 that are significantly lower than those charged to the general
5 public, and if Hearst had used its substantial bargaining power
6 in the license negotiations, he would expect it to have
7 negotiated a license fee for Otto's photograph in the range of
8 \$25 to \$50.

9 I credit Mr. Rachlis' testimony that large media
10 companies are generally able to negotiate lower license fees
11 than those paid by the public. I also credit his testimony
12 that the factors he articulated affect the value of a
13 reasonable license fee for any particular photograph. Based on
14 my analysis of those factors, as well as my finding regarding
15 Hearst's significant bargaining power, I conclude that the
16 reasonable license fee for Otto's photo would be at the lower
17 end of the ranges articulated by Defendant's experts. Otto's
18 photograph was used to illustrate a news story, and therefore
19 would have been licensed for an editorial use. Because Otto's
20 photograph was used by other news outlets, any license
21 negotiated with Hearst would not have been exclusive. Otto's
22 photograph is not unique -- indeed, other photographs of the
23 same event were displayed in the Esquire.com story -- nor is it
24 high quality. It was not taken with professional camera
25 equipment and shows other cameras and phones in the foreground.

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1 I do not make any specific findings with respect to the
2 duration of time for which Hearst would have wanted to license
3 Otto's photo, other than to note that I expect that the
4 duration of the license would have been similar to the duration
5 of the licenses that Hearst negotiated for the thirteen
6 photographs identified by Mr. Plumpe, given the similarity of
7 those photographs to Otto's photograph and the purposes for
8 which they were used on the Esquire.com website. I therefore
9 conclude that the most appropriate measure of a reasonable
10 license fee in this case is the amount actually paid for the
11 use of individual photographs similar to Otto's photograph.
12 This was the mechanism employed by Mr. Plumpe, which resulted
13 in his assessment that a reasonable license fee for Otto's
14 photograph was \$100.

15 I note that Mr. Sebastian testified that licenses
16 acquired by Hearst for images used on Esquire.com typically
17 cost between \$20 to \$100 for an image of a public figure, such
18 as a celebrity or politician. As a result, the \$100 license
19 fee is at the high end of the spectrum of fees usually paid by
20 Hearst to license images of a public figure. \$100 is
21 substantially greater than the average of \$43 and median of \$35
22 paid by Hearst for licenses of stock photographs, as calculated
23 by Mr. Plumpe. This average and median, however, may be
24 affected by the fact that Hearst categorized both "stock" and
25 "editorial" photographs as "stock" photographs. This potential

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1 issue with this analysis is resolved by Mr. Plumpe's decision
2 to benchmark the license fee against a subset of equivalent
3 editorial images. I believe that Mr. Plumpe's conclusion is
4 reasonable. It is consistent with the direct evidence. Based
5 on my assessment of the photograph under the analytical
6 framework provided by Mr. Rachlis, I conclude that a higher fee
7 is not warranted. Consequently, I find that a reasonable
8 license fee for the photograph at issue in this case is \$100.

9 I should comment briefly on Plaintiff's argument that
10 I should value this image at \$4,000 because there was evidence
11 that Hearst was willing to pay \$4,000 for a particular
12 commissioned image. I view that argument to be wholly
13 implausible. First, this was not a commissioned photograph.
14 Second, it is not reasonable to ask me to value this image at
15 the value of what it would have cost had it been a commissioned
16 photograph. There is no basis for me to speculate that Hearst
17 would have commissioned this photograph, much less that it
18 would have paid the highest possible amount for such a
19 photograph. The argument that I should use \$4,000 as a
20 benchmark is particularly frail when one considers this
21 photograph in the context of the factors described by Mr.
22 Rachlis -- this is not a professional photograph, it is not
23 high quality, it is not well-composed, it is not unique, and it
24 was not used exclusively by Hearst. Quite simply not all
25 photographs are worth the same amount -- The Dutchess of Sussex

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1 can expect to be paid more for a staged photograph of her child
2 than another new parent can expect for an iPhone photograph of
3 theirs. The logic behind Plaintiff's argument -- that the
4 highest amount a person will pay for a given photograph is what
5 they should be expected to pay for any photograph -- is in my
6 view quite flawed. In any event, I find that Plaintiff's
7 position regarding the valuation of the license is not
8 supported on this record.

9 I must also address the revenue received by Hearst as
10 a result of its use of Otto's photograph. Hearst does not
11 charge for access to Esquire.com and did not charge for access
12 to the article alongside which Otto's photograph was displayed.
13 However, commercial advertisements were visible on the same
14 webpage where Otto's photograph was displayed. Because the
15 article was not part of a sponsorship program, the only revenue
16 Hearst received from its publication of the article would have
17 derived from those programmatic ads. These ads are served to
18 Hearst's websites through a series of online ad exchanges which
19 conduct split-second auctions for the ad space. Hearst
20 receives only a fraction of a cent per page view from the
21 display of each programmatic ad on Esquire.com. The most
22 revenue Hearst might have realized from the programmatic ads
23 that ran alongside the article is \$148.99.

24 III. LEGAL CONCLUSIONS

25 A. Willfulness

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1 After establishing liability for copyright
2 infringement, a copyright owner may elect to recover either
3 statutory damages or actual damages and profits. 17 U.S.C. §
4 504(c)(1). Here, Otto has elected to recover statutory
5 damages. Joint Pre-Trial Order, Dkt. No. 102, at 18-21. With
6 respect to any one infringing work, the Court may award
7 statutory damages between \$750 and \$30,000. 17 U.S.C. §
8 504(c)(1). However, if the Court determines that the
9 infringement was willful, it may, in its discretion, enhance
10 the statutory damages award up to \$150,000 per infringed work.
11 § 504(c)(2). The burden falls on the copyright owner to prove
12 that the infringement is willful. Id.

13 A copyright infringement is "willful" within the
14 meaning of § 504(c)(2) if the copyright owner shows "(1) that
15 the defendant was actually aware of the infringing activity, or
16 (2) that the defendant's actions were the result of 'reckless
17 disregard' for, or 'willful blindness' to, the copyright
18 holder's rights." Island Software & Computer Serv., Inc. v.
19 Microsoft Corp., 413 F.3d 257, 263 (2d Cir. 2005). "[A]
20 willfully blind defendant is one who takes deliberate actions
21 to avoid confirming a high probability of wrongdoing and who
22 can almost be said to have actually known the critical facts.
23 [A] reckless defendant is one who . . . knows of a substantial
24 and unjustified risk of such wrongdoing." Global-Tech
25 Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769-70 (2011). "To

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1 show willfulness, [a copyright owner is] not required to prove
2 [defendant's] actual knowledge that it was infringing.
3 Knowledge of infringement may be constructive rather than
4 actual." Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d
5 996, 1010 (2d Cir. 1995). As a preliminary matter, Hearst
6 argues that this standard is incorrect because proof of
7 "constructive knowledge" is akin to a finding of negligence, a
8 mens rea lower than willfulness. See Erickson Prods., Inc. v.
9 Kast, 921 F.3d 822, 834 (9th Cir. 2019). However, the Second
10 Circuit in Knitwaves made clear that its reference to
11 constructive knowledge meant only that willfulness "need not be
12 proven directly but may be inferred from the defendant's
13 conduct." Knitwaves, 71 F.3d at 1010. The Second Circuit has
14 more recently confirmed that understanding. Island Software,
15 413 F.3d at 264 ("[A] plaintiff can still prove willfulness by
16 proffering circumstantial evidence that gives rise to an
17 inference of willful conduct.") (citing Knitwaves, 71 F.3d at
18 1010). In other words, a defendant's knowledge may be inferred
19 from his or her conduct. N.A.S. Import. Corp. v. Chenson
20 Enterprises, Inc., 968 F.2d 250, 252 (2d Cir. 1992).

21 The Court concludes that Hearst's infringement in this
22 case was not willful. The evidence in the record establishes
23 that no person at Hearst had actual knowledge that posting the
24 photograph on Esquire.com would infringe Otto's copyright.
25 Therefore, Otto was required to prove that Hearst acted with

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1 willful blindness or reckless disregard.

2 My conclusion rests very heavily on the burden of
3 proof. Plaintiff asks me to infer that, based on the limited
4 time period between his pitch of the story to Mr. Sebastian and
5 the story's posting on Esquire.com, Mr. Wade did not make any
6 significant effort to investigate or contact the owner of the
7 photograph, and that he must not have made a good faith
8 determination that the use of the image constituted fair use.
9 But it is at least equally possible for me to draw the
10 inference that before posting Otto's photograph on the
11 Esquire.com website, Mr. Wade did make a good faith
12 determination that use of the photograph in the article would
13 be fair use. Supporting that inference is Mr. Sebastian's
14 testimony regarding Mr. Wade's experience as an editor, and Mr.
15 Sebastian's lack of knowledge of any concerns regarding Mr.
16 Wade's compliance with copyright law in the past, together with
17 the testimony of Ms. Siegel regarding the hiring practices of
18 HMDM generally, and her testimony regarding the effectiveness
19 of HMDM's training programs. In addition, as noted above, on
20 the CMS system, the "No Rights" box was checked for "Image
21 Rights," supporting the conclusion that Mr. Wade made a
22 determination that the image could be used in the context of
23 his article, but no other. That determination is consistent
24 with a determination of fair use.

25 As counsel has argued, fair use determinations are

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1 fact specific. I concluded at summary judgment that no
2 reasonable jury could conclude that Hearst's publication of
3 Otto's photograph was fair use. But Mr. Wade was not a jury
4 making his determination with the benefit of precise legal
5 instructions and I think on these facts, he could reasonably
6 have believed in good faith that the use of the image was fair
7 use. Because I find that it is just as likely that Mr. Wade
8 determined in good faith, based on his training, that no
9 license was necessary for the photograph as it is that Mr. Wade
10 recklessly disregarded or was willfully blind to Plaintiff's
11 ownership rights in the photograph, Plaintiff has not met his
12 burden of demonstrating that Mr. Wade's infringement was
13 willful. See Agence France Presse v. Morel, 934 F. Supp. 2d
14 547, 570, reconsidered in part on other grounds, 934 F. Supp.
15 2d 584 (S.D.N.Y. 2013) ("Infringement is generally not willful
16 if a party reasonably and in good faith believes that its
17 conduct is innocent."). I note that this conclusion is largely
18 a consequence of Plaintiff's decision not to depose Mr. Wade or
19 to put forth evidence at trial which would shed light on Mr.
20 Wade's mental state concerning the use of Plaintiff's
21 photograph.

22 I also find that Mr. Sebastian's decision to delegate
23 determinations regarding fair use and the potential need for a
24 license to Mr. Wade was not willfully blind or reckless. The
25 evidence at trial did not demonstrate that Mr. Sebastian was

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1 subjectively aware of a risk that Mr. Wade would infringe
2 Plaintiff's copyright. To the contrary, Mr. Sebastian
3 testified that Mr. Wade had worked at Hearst for a substantial
4 period of time and that he was not aware of any instance in
5 which Mr. Wade had been accused of copyright infringement. Mr.
6 Sebastian believed Mr. Wade had substantial experience in the
7 publishing industry. Considering those facts in light of
8 Hearst's general practices regarding the hiring and training of
9 its employees and freelancers, together with the other facts
10 presented at trial, the Court does not infer that Mr. Sebastian
11 acted willfully.

12 In his closing argument, Plaintiff's counsel also
13 argued that Hearst has a general policy of willful blindness
14 towards copyright infringement with regard to photographs taken
15 from social media. However, the evidence in the record does
16 not support this conclusion. I have to decide the issues
17 presented here based on the evidence put forth at trial. The
18 unrefuted testimony of Ms. Siegel, which I detailed previously,
19 describes Hearst as a company that is committed to the
20 protection of third-party content creators. The evidence
21 presented here is that HMDM hires skilled people and provides
22 them with the tools that HMDM believes are necessary for them
23 to properly comply with the copyright law. The company
24 provides regular training to employees and contractors.
25 Hearst's senior management -- as represented by the testimony

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1 of Ms. Siegel -- believes that Hearst's training and hiring
2 practices are effective protections against copyright
3 infringement. Rather than establishing that Hearst has no
4 regard for copyrights, the evidence presented at trial was that
5 Hearst uses a huge volume of images regularly, and is subject
6 to copyright litigation with respect to only a small fraction
7 of the images that it uses. I have to decide this case based
8 on the evidence presented, and there is a substantial volume of
9 essentially unrefuted evidence before the Court that Hearst and
10 HMDM have put in place a system that they reasonably believe
11 provides effective protection to copyright holders.

12 Lacking other evidence of willfulness, Plaintiff
13 points me to a number of facts about Hearst's practices and
14 argues that these facts provide a basis for me to draw an
15 inference of willfulness. I do not believe those facts to be
16 sufficient to draw that conclusion. For example, the fact that
17 Hearst lacks written policies containing its lawyers' advice on
18 fair use does not necessarily lead to the conclusion that
19 Hearst is unconcerned with the rights of copyright holders.
20 Instead, that fact can just as easily be explained by the
21 possibility that Hearst does not want to risk a potential
22 waiver of the attorney-client privilege by memorializing its
23 lawyers' advice in writing and disseminating that writing
24 widely. And, again, the evidence presented is that the senior
25 management of Hearst believes that its practices are

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1 effective -- and they have presented data to illustrate the
2 reasonableness of their position. The evidence presented at
3 trial shows, again, that only a small fraction of the images
4 used by Hearst and HMDM are the subject of copyright
5 litigation. This does not support the conclusion that Hearst
6 is consciously avoiding compliance with copyright law

7 I understand that Plaintiff contends that the absence
8 of a tracking system for fair use determinations should drive
9 the Court to draw the inference that Hearst acted willfully.
10 However, I do not believe that to be the case. Hearst's
11 decision not to include a field in CMS that would allow users
12 to track whether they made a fair use determination reveals
13 little about Hearst's mindset, at least in the absence of
14 evidence that Hearst considered and rejected such a system or
15 that tracking fair use determinations is a standard industry
16 practice. Unlike counsel for Hearst, I can see how such a
17 check box might be helpful to support a defense of fair use in
18 the future, or to ensure that a conscious decision was made
19 regarding fair use. But, even if Hearst's recordkeeping system
20 could be structured in an arguably better way, that does not
21 establish that they willfully infringed Plaintiff's copyright
22 in this case. That position seeks to hold Hearst liable for
23 conduct that is far closer to negligence than to willfulness.

24 Nor does the Court conclude, having read Mr. Wade's
25 and Mr. Sebastian's communications surrounding the publication

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1 of the Trump wedding crashing article, that Mr. Sebastian
2 greenlighted Mr. Wade's use of Otto's photograph as soon as he
3 found out that the photograph was from Instagram. The Court
4 interprets Mr. Sebastian's comment to mean what it says:
5 "Let's start there," not "That is all we need to know."

6 As an overarching comment, as I have already said, I
7 have to decide this case based on the evidence presented at
8 trial. Arguments by counsel are helpful to direct me to the
9 proper inferences to draw from the evidence, but they are not
10 evidence. The evidence admitted at trial is the evidence, and
11 inferences and arguments are ultimately bounded by it. The
12 litigation position of Hearst with respect to fair use is not
13 evidence in the record at trial which I can use to evaluate
14 Hearst's state of mind. I have specifically considered the
15 inferences that Plaintiff has asked me to draw from the
16 evidence, and I find that the evidence in the record does not
17 support the conclusion that Defendant was willfully blind or
18 otherwise willful based on my assessment of the record as a
19 whole.

20 However, I would like to pause momentarily to offer
21 some thoughts on the validity of Plaintiff's "corporate willful
22 blindness" theory as a whole. Defendant has taken the position
23 throughout this litigation that "the willfulness inquiry stops
24 at a consideration of the act of infringement at issue and the
25 state of the mind of the person that took those actions."

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1 Trial Transcript at 155:18-20. Plaintiff has argued that
2 general evidence about Hearst's practices and policies is
3 relevant to the willfulness inquiry because it speaks to a
4 broad corporate mens rea of willful blindness. There is no
5 question that the reference to willfulness in 17 U.S.C §
6 504(c)(2) is willfulness as to a specific act of infringement.
7 Similarly, it is clear that a corporation can be willfully
8 blind or reckless regarding the possibility of infringement.
9 See Global-Tech, 563 U.S. at 768. However, as noted above,
10 willful blindness and recklessness require, respectively,
11 knowledge of a "high probability of" or a "substantial and
12 unjustified risk" of wrongdoing. What is not clear is the
13 level of generality at which that risk should be defined, or --
14 put differently -- whether a corporation can be willfully blind
15 regarding a specific act of infringement if individuals within
16 the company consciously disregard a high probability that their
17 policies will lead to infringement generally. I am not aware
18 of any cases in this Circuit addressing that issue and, in
19 light of the fact that it was not briefed by the parties and is
20 not necessary to my decision, I decline to address it now. I
21 note, as well, that counsel for Plaintiff conceded during
22 closing argument that to prove willfulness, he needed to prove
23 it as to Mr. Wade or Mr. Sebastian. Nevertheless, I have
24 addressed a broader theory of corporate willfulness, and
25 concluded that there is an insufficient basis to find

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1 willfulness at any level of the corporate defendant on this
2 record.

3
4 IV. STATUTORY DAMAGES

5 "When determining the amount of statutory damages to
6 award for copyright infringement, courts consider: (1) the
7 infringer's state of mind; (2) the expenses saved, and profits
8 earned, by the infringer; (3) the revenue lost by the copyright
9 holder; (4) the deterrent effect on the infringer and third
10 parties; (5) the infringer's cooperation in providing evidence
11 concerning the value of the infringing material; and (6) the
12 conduct and attitude of the parties." Bryant v. Media Right
13 Prods., Inc., 603 F.3d 135, 144 (2d Cir. 2010); see also
14 Psihoyos v. John Wiley & Sons, Inc., 748 F.3d 120, 127 (2d Cir.
15 2014). However, under Second Circuit law, a plaintiff seeking
16 statutory damages has no obligation to show actual damages or
17 losses. See Psihoyos v. John Wiley & Sons, Inc., No. 11 CIV.
18 1416 JPO, 2012 WL 5506121, at *4 (S.D.N.Y. November 7, 2012),
19 affirmed, 748 F.3d 120, 127 (2d Cir. 2014). I make the
20 following conclusions of law with respect to the factors
21 articulated in Bryant.

22 As previously discussed, I have determined that
23 Hearst's infringement was not willful. I have also found that
24 the expenses saved by Hearst and the revenue lost by Otto as a
25 result of the infringement were the reasonable license fee of

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1 \$100. I have also determined that the maximum profits earned
2 by Hearst as a result of its use of Otto's photograph is
3 advertising revenue in the amount of \$148.99.

4 As part of my analysis of statutory damages, I must
5 also consider the deterrent effect of the award on Hearst and
6 third parties. "[S]tatutory damages are not meant to be merely
7 compensatory or restitutionary." Yurman Design, Inc. v. PAJ,
8 Inc., 262 F.3d 101, 113-14 (2d Cir. 2001). Instead, "[t]he
9 statutory award is also meant to discourage wrongful conduct."
10 Id. (quoting N.A.S. Import, 968 F.2d at 252). Hearst's status
11 as a major participant in the publishing industry mitigates in
12 favor of a larger statutory damages award for purposes of
13 deterrence. See, e.g., UMG Recordings, Inc. v. MP3.Com, Inc.,
14 No. 00 CIV. 472 JSR, 2000 WL 1262568, at *6 (S.D.N.Y. Sept. 6,
15 2000) ("[T]he defendant's size and financial assets are highly
16 relevant to arriving at the appropriate level of statutory
17 damages"). However, in light of my previous findings
18 regarding the lack of evidence that the Hearst organization as
19 a whole generally disregards the rights of copyright owners, I
20 conclude that a large statutory damages award is not necessary
21 to deter Hearst against future infringement.

22 Otto claims that there is a broad need for general
23 deterrence in infringement cases involving unauthorized use of
24 photographs, basing his argument on what he calls the
25 "flooding" of courts with copyright infringement cases.

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1 However, there is no evidence regarding the frequency of
2 copyright infringement by other media organizations in the
3 record of this case. Based on the record before me, I also do
4 not conclude that there is a general need for deterrence which
5 would justify higher statutory damages in this case than I
6 expect to award.

7 Finally, I must consider Hearst's cooperation in
8 providing evidence concerning the value of the infringing
9 material and the conduct and attitude of the parties. I note
10 that Hearst has appeared in and defended this action and has
11 put forth evidence at trial of the value of a license for
12 Otto's photograph. Beyond those limited facts, I have no basis
13 to evaluate the quality or extent of Hearst's cooperation in
14 providing evidence concerning the value of the infringing
15 material. Similarly, beyond recognizing that various disputes
16 over conduct during discovery and settlement negotiations have
17 arisen between the parties over the course of this litigation,
18 I have no factual basis to evaluate the conduct and attitude of
19 the parties. No evidence put forth at trial relates to this
20 factor which I have not already considered as part of my
21 statutory damages analysis. I therefore find that both of
22 these factors are neutral.

23 Based on my evaluation of the factors described above,
24 I find that statutory damages in the amount of five times the
25 reasonable license fee of \$100 are appropriate. Because such

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1 an award is less than the statutory minimum, I award Plaintiff
2 the statutory minimum of \$750,000 -- sorry, \$750. Although
3 Otto has offered examples of cases in which plaintiffs have
4 been awarded \$30,000 in statutory damages for copyright
5 infringement, those cases involved different circumstances than
6 those presented here. Most importantly, the majority of those
7 cases involved defaults by defendants who failed to appear and
8 defend themselves.

9 My award of \$750 is based on my evaluation of the
10 record as a whole, and my assessment of the factors that I
11 described above. An award in this amount is also in accordance
12 with the trend in this Circuit to award a prevailing copyright
13 infringement plaintiff statutory damages in an amount that is a
14 single-digit multiple of a reasonable licensing fee. See Mango
15 v. BuzzFeed, Inc., 356 F. Supp. 3d 368, 374 (S.D.N.Y. 2019)
16 ("[C]ourts in this Circuit commonly award, in cases of
17 non-innocent infringement, statutory damages of between three
18 and five times the cost of the licensing fees the defendant
19 would have paid."); Barcroft Media, Ltd., 297 F. Supp. 3d at
20 359; Michael Grecco Prods., Inc. v. Function(X) Inc., No. 18
21 CIV. 386 (NRB), 2019 WL 1368731, at *4-5 (S.D.N.Y. Mar. 11,
22 2019). I believe that a multiplier greater than 7.5 times the
23 licensing fee, which would be required in order to bring the
24 award to a figure in excess of the \$750 statutory minimum,
25 would be excessive in light of my evaluation of the facts of

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1 this case and applicable law.

2 V.. CONCLUSION

3 For the foregoing reasons, I find that damages should
4 be awarded to Plaintiff in the amount of \$750.00. Any
5 application for attorneys' fees in connection with this matter
6 must be submitted to the Court no later than August 2, 2019.
7 Any opposition to that application must be filed no later than
8 August 13, 2019. And any reply must be filed no later than
9 August 16, 2019. Counsel must present a sworn affidavit
10 describing the experience and qualifications of each
11 professional who billed time to the case, and attach
12 contemporaneous time records showing the amount billed by each
13 lawyer and the nature of the associated services. The
14 affidavit must also show the range of fees charged by, or
15 authorized by a court with respect to, that lawyer over the
16 course of the last two calendar years. The affidavit must set
17 forth any additional facts that are pertinent to the Court's
18 evaluation of counsel's requested fee award.

19 So, thank you very much, counsel. That completes the
20 reading of my decision which was, if you're interested, about
21 twelve-and-a-half single-spaced pages.

22 Counsel, to the extent that the parties are able to
23 confer and agree upon an award of attorneys' fees and costs, I
24 would encourage you to engage in that conversation before
25 briefing commences to the extent you're unable to stipulate to

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1 a proper amount of such fees, which I don't anticipate based on
2 our discussions at the outset of the trial. You should submit
3 your respective briefing to the Court on the schedule that I've
4 just described.

5 Good. So anything else that we should take up now?
6 First, counsel for plaintiff?

7 Anything for plaintiff before we recess?

8 MR. FREEMAN: Not for plaintiff.

9 THE COURT: Good. Thank you very much.

10 Counsel for defendant?

11 MR. BOYER: No, your Honor. Except just like to thank
12 the Court for its prompt attention to this case. We note only
13 four calendar dates have passed since the trial. So I just
14 wanted to note that we appreciate the prompt attention. Thank
15 you.

16 THE COURT: Thank you. Happy to do so. Thank you
17 all.

18 (Adjourned)